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No. ~~1752~~

In the Supreme Court of the United States

OCTOBER TERM, 1970

JOSEPH AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
WILL WILSON,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. Earlier opinions of the court of appeals in this case (Pet. Apps. E and F) are reported at 393 F. 2d 597 and 338 F. 2d 146, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1971. A petition for rehearing was denied on May 10, 1971. The petition for a writ of certiorari was filed on May 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether the trial judge erred in refusing to interrogate the jury with respect to its exposure to newspaper articles appearing in newspapers during the two-day trial.

2. Whether the trial judge erred in allowing the jury to separate for lunch during the course of its deliberations.

3. Whether it was error for the court, over objection, to charge that no inference could be drawn from the failure of the defendant to take the stand.

STATEMENT

In 1963, in the United States District Court for the District of Kansas, petitioner was tried without a jury and convicted of unlawful possession and transportation of a large number of migratory birds, in violation of 16 U.S.C. 703. His conviction was subsequently reversed on the grounds that evidence as to the seizure of certain of the birds should have been suppressed as the product of an unlawful search. *Aiappa* v. *United States*, 338 F. 2d 146 (C.A. 10) (Pet. App. 21–25).

Following a remand for a new trial and upon the application of petitioner, the case was transferred from the Kansas City Division some 100 miles to the Fort Scott Division because of prejudicial publicity. Petitioner was again convicted and was sentenced to three months' imprisonment and fined $1,000. The court of appeals affirmed. 393 F. 2d 597 (Pet App. 10–20). A petition to this Court for a writ of certiorari was opposed by the government, but the Court was in-

formed that a conversation in which petitioner participated in 1961, prior to the events here involved, had been overheard electronically. The Court thereupon remanded the case *sub nom. Giordano* v. *United States*, 394 U.S. 310, for further proceedings in conformity with *Alderman* v. *United States*, 394 U.S. 165.

Upon the second remand to the district court, the government furnished petitioner with a log of the overhearing in question. Petitioner conceded that the conversation as logged had no bearing on the charges here involved, and the district court so found. On appeal, petitioner argued that the district court had improperly limited the hearing on remand and reargued some of the contentions rejected by the court of appeals on the previous appeal. The court of appeals affirmed (Pet. App. 1–6). In the present petition for certiorari, petitioner raises three issues relating to his second conviction, all of which were presented to this Court in his earlier petition, No. 124, 1968 Term, but not acted on by this Court.

ARGUMENT

1. During the two-day second trial of this case at Fort Scott, Kansas, articles appeared in the inside pages of two Kansas City newspapers, one of which referred to petitioner as a gangland figure and the other of which reported the refusal of witnesses to answer questions. At the conclusion of all the evidence, petitioner moved for a mistrial on the basis of these stories. The trial court denied the motion, saying that it had specifically instructed the jury not to read the newspapers and that to grant the request for a voir

dire might have just the opposite effect of drawing the jury's attention to the prejudicial matter. The court thereafter instructed the jury to disregard any information about this case which may have been received from sources outside of the trial (Pet. App. 19).

The determination whether there has been prejudice from news publicity must depend in each case upon its special facts. *Marshall* v. *United States,* 360 U.S. 310, 312. There was nothing here which approached the massive publicity which was held to invalidate the conviction in *Sheppard* v. *Maxwell,* 384 U.S. 333. The newspaper stories were on the inside pages of Kansas City, not local, newspapers. The charge contained in one article that petitioner was a gangland figure was not one which would itself arouse emotion. Even if, as petitioner belatedly asserts, the newspapers were available in Fort Scott, the trial judge's instructions, the non-inflammatory nature of the articles and the absence of any evidence in the record that any juror read the newspapers renders further review of issue by this Court unwarranted.

2. The trial judge did not abuse his discretion in allowing the jury to separate for lunch during deliberations. See *Hines* v. *United States,* 365 F. 2d 649 (C.A. 10); *Cardarella* v. *United States,* 375 F. 2d 222 (C.A. 8), certiorari denied, 389 U.S. 882. There is no reason to apply to Fort Scott, Kansas, the absolute rule against separation laid down in *United States* v. *D'Antonio,* 342 F. 2d 667 (C.A. 7), for the Seventh Circuit, whose major business comes from Chicago.

3. The trial court's charge to the jury with respect to petitioner's failure to take the stand,[1] which was objected to by the defense, did not violate petitioner's privilege against self-incrimination. The instruction was proper and in accordance with 18 U.S.C. 3481 The court may properly give such a charge over defense objection since it may feel that, unless instructed, the jury itself would note and draw an inference from the failure of the defendant to testify. See *United States* v. *Rimanich*, 422 F. 2d 817 (C.A. 7).

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1971.

[1] The instruction given was as follows (Pet. App. 17):

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

The legal theory for this rule is immaterial so far as you are concerned, but the important and vital point for you, as jurors, is that a defendant has the unqualified right not to take the stand and you may not in any manner draw any inference against the defendant because he did not take the stand.

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